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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-625

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, AND JAMES T. MCINTYRE, JR., DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, *Petitioners,*

v.

SIERRA CLUB, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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In accordance with Supreme Court Rule 41(5), respondents wish to call to the attention of the Court the following additional intervening matter which was not available in time to have it included in respondents' brief in chief.

As respondents indicated in note 23 of their brief in chief, on February 19, 1979 respondents sent to several agencies, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976), requests for informa-

tion regarding agencies' comments on the proposed new Regulation of the Council on Environmental Quality (CEQ) which defined "legislation." One of the agencies to which a request was submitted on April 11 and April 12, 1979 furnished respondents with a copy of a December 12, 1977 memorandum from Charles Warren, Chairman of the Council on Environmental Quality, who forwarded to the heads of all agencies CEQ's draft Regulations implementing the National Environmental Policy Act (NEPA), including the draft Regulation defining "legislation," a copy of which also has been provided to respondents.[1] That memorandum and draft Regulation are the subjects of the first part of this Supplemental Brief.

As petitioners and respondents both recognize in their briefs in chief, CEQ is the entity specifically entrusted with interpreting the meaning of the action-forcing mandate in NEPA through the promulgation of CEQ's earlier Guidelines and its new Regulations (effective July 30, 1979). Budget requests are no longer considered "proposals for legislation" under the new final Regulations (although those Regulations do not exclude requests for appropriations legislation from the definition of "major Federal action").[2]

The abrupt shift by CEQ in explicitly excluding budget requests from the definition of "legislation" has been justified by CEQ on grounds that "in its

[1] The draft Regulation defining "legislation" was designated Section 1508.15. The proposed Regulation was numbered as Section 1508.16 and appeared in 43 Fed. Reg. 25,245. The final Regulation has been renumbered as Section 1508.17 and appears in 43 Fed. Reg. 56,004.

[2] *See* discussion in respondents' brief in chief at 26-33 and in the footnotes contained therein; and *id.* at 40.

experience . . . preparation of impact statements is ill-suited to the budget preparation process." 43 Fed. Reg. 55,989. In fact, however, at the time when CEQ first prepared its new Regulations to implement NEPA, and forwarded them for review to the heads of agencies on December 12, 1977, CEQ still interpreted the phrase "proposals for legislation" in NEPA to include requests for appropriations.

This consistent interpretation by CEQ followed extensive interaction with the public and the agencies, including public hearings in June 1977 in which CEQ "affirmatively involved NEPA's critics as well as its friends"; detailed responses from over 300 agencies, organizations and individuals "(representing a broad cross-section)" to a 38-page "NEPA Hearing Questionnaire"; and meetings with "every agency of the Federal government to discuss what should be in the regulations." Memorandum from Charles Warren, Chairman, Council on Environmental Quality, to Heads of Agencies, Draft Regulations to Implement the National Environmental Policy Act (NEPA) (December 12, 1977) [hereinafter "Memorandum"]. CEQ was also well aware of judicial interpretations applying NEPA to the budget process. *Id.* at 3. Thus, just six months before its formal proposal, draft Section 1508.15 entitled "Legislation," which accompanied the CEQ Memorandum to the heads of all agencies was precisely the same regulation which was incorporated in proposed Section 1508.16 (43 Fed. Reg. 25,245) and in final Section 1508.17 of the new Regulations (43 Fed. Reg. 56,004), *except* that the phrase "but does not include requests for appropriations" was added in the proposed and final Regulation at what was the end of the first sentence of the draft Regulation.

In short, it is quite clear that CEQ had independently determined at the time of its draft Regulations to maintain its interpretation, which it had consistently made for nearly a decade after the passage of NEPA, that requests for budget approval and appropriations *were* subject to the procedural requirements of NEPA. Sometime between December 12, 1977 and the proposal of the new Regulations on June 8, 1978, the "relentless force called the Office of Management and Budget,"[3] and perhaps other agencies, had exerted sufficient pressure on CEQ to cause CEQ to "flip-flop" on its interpretation. Indeed CEQ noted in its Memorandum that it wanted to "work out appropriate texts for the Regulations that are acceptable to Federal agencies generally," and that it intended "to coordinate as closely as possible with OMB on the budget issue. . . ." Memorandum at 3. In the proposed Regulations themselves, CEQ even referred to the court of appeals' opinion in the instant case and stated that "in consultation with OMB [it] had been prepared to propose this [new] wording." 43 Fed. Reg. 25,245 n.1.

Under these circumstances, CEQ's vague and unsubstantiated justifications for its shift in policy on NEPA's application to the budget process deserve to be given little deference. While it is not clear which considerations motivated CEQ to adopt a position contrary to that in three earlier versions of its Guidelines and to that of several federal courts, its new statutory construction does not appear to be based on any

[3] *Washington Post*, April 12, 1979 at A21, Col. 5-6 (editorial discussing the environmental consequences of the Administration's proposed 1980 budget calling for a 26% cut in rail dollars and a 6% increase in subsidies to other forms of transit).

"new developments" or "experience" which deserve to be accorded any weight.

* * * *

Respondents today have received petitioners' Reply Brief. Rule 41 of the Supreme Court Rules neither specifically provides for nor prohibits the filing of a Reply Brief by respondents. Ordinarily respondents would feel no obligation to respond to petitioners' contentions in their Reply Brief, and normally would avoid burdening the Court with any additional material, by saving any response for oral argument. However, respondents feel obliged to clarify one wholly inaccurate contention of the petitioners which is made throughout their Reply Brief. This response to petitioners' claim is made in accordance with Rule 41(3), by filing this portion of the Supplemental Brief within three days before the scheduled oral argument on April 18, 1979.[4]

Petitioners repeatedly assert that respondents and *amici curiae* have suggested that whenever an agency submits an annual budget request to Congress it "need not prepare and distribute an EIS on that proposal" for appropriations legislation until the President's transmission of the budget to Congress. *See* Pet. Reply Br. at 1-2, 4-6, and n.1. In petitioners' view, respondents' "suggestion" undermines the court of appeals' conclusion that "an agency budget request constitutes a 'proposal' within the meaning of Section 102(2)(C)," *id.* at 1; and the suggestion "appears to raise a question not before the Court." *Id.* at 5.

[4] If leave of the Court is considered necessary, respondents hereby respectfully request permission that this portion of the Supplemental Brief be received for consideration.

Petitioners' characterization of the argument of respondents is wholly inaccurate, and serves only to confuse and mislead the Court in considering the issues before it.[5]

Respondents' brief in chief and the briefs of *amici curiae* are replete with statements and suggestions that agency requests for budget approval and appropriations must be *accompanied* by environmental impact statements (EISs) when the requests first are made, because they constitute either "proposals for legislation" or "proposals for major Federal action."[6] Petitioners have totally misread and mischaracterized respondents' argument, which consistently has been that EISs must be prepared and must accompany certain agency budget requests *by the time* the agency proposals are forwarded to the Office of Management and Budget (OMB). We have further pointed out that, if a budget request is considered a "proposal" under NEPA, public *disclosure* of the EIS prepared on that proposal *may* appropriately await the President's transmission to Congress of the agency's legislative proposal for appropriations.

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[5] It is the petitioners who have inappropriately characterized the first question which is presented to the Court. As respondents' first question indicates, and as The Wilderness Society as *amicus curiae* points out in its brief at 3, the main issue before the Court is whether certain budget requests fall within the terms of NEPA, thereby requiring the preparation of an EIS at the time such a proposal is made; not whether *every* annual budget request so requires the preparation of an EIS.

[6] *See, e.g.*, Resp. Br. at 7, 9-10, 42-44, 50-51, 56, 57, 60, 68; Br. of National Wildlife Federation and Defenders of Wildlife as *amici curiae* at 7-8, 9, 10-11, 19-20; Br. of The Wilderness Society as *amicus curiae* at 5, 7-8, 8-9, 28, 30.

Our brief in chief emphasizes throughout that, among others, one purpose of an EIS is to ensure that relevant environmental data are in front of an agency and considered by it in the critical decision-making process involving preparation of the budget. *See* Resp. Br. at 42-44. In this way the EIS serves as an effective management tool. We point out that an EIS which accompanies a budget request will give the President a clear understanding of the environmental consequences which may be triggered by Congress' action on the agency proposal for appropriations legislation. *Id.* at 44. To serve that purpose, obviously, the EIS needs to be prepared *before* OMB or the President receives the agency's proposal.[7] A proper reading of our brief in chief makes it quite clear that we have never suggested anything to the contrary. Further, we have referred approvingly to the several Federal court decisions which have held that appropriations requests are "proposals" under NEPA requiring preparation of an EIS at the time the requests are submitted to OMB. *See* Resp. Br. at 52-54.

In short, respondents have always asserted (and nothing in our brief in chief is intended to imply anything to the contrary) that (1) certain agency budget requests are "proposals for legislation" and/or "proposals for major Federal action" under NEPA; and that (2) Congress, under the terms of NEPA, has re-

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[7] Conceivably, petitioners' confusion may stem from their failure to understand that final agency budget requests which propose a considered programmatic course following a programmatic review come within the terms of NEPA although they are forwarded through OMB and the President before they arrive for legislative consideration by Congress. Under Sections 214 and 215 of the Budget and Accounting Act of 1921 agencies are required to prepare annual budget requests and to submit them to OMB. 31 U.S.C. §§ 22, 23.

quired that agencies submit an EIS to OMB with each such proposal. Respondents and *amici curiae* have referred to the flexibility of NEPA in permitting for the delayed *public disclosure* of the already prepared EIS. We have done so in connection with our response to petitioners' contention that the budget process must remain entirely confidential, and that nothing related to any budget request, including an independently prepared EIS which discusses the environmental consequences of operating an ongoing program at various levels of appropriations, may be publicly disclosed before the request for appropriations legislation is before the Congress.

Respondents and *amici curiae* contend that EISs must be prepared and must *accompany* certain agency proposals for appropriations legislation by the time such proposals are forwarded to OMB. To the extent that any of the briefs submitted in support of this position imply anything to the contrary—and we vigorously assert they do not—we wish to clarify any such implication in the context of the above-stated remarks.

Respectfully submitted,

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